Supreme Court, U.S.
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No. 05-1649

In The

Supreme Court of the United States

DEVON E. STRAFFORD and MICHAEL C. LUNEKE, individually and as co-personal representatives of the Estate of Lexi E. Strafford Luneke, Deceased,

Petitioners,

v.

AGENCY FOR HEALTH CARE ADMINISTRATION,

Respondent.

On Petition For Writ Of Certiorari To The District Court Of Appeal Of Florida, Second District

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether 42 U.S.C. § 1396p, 42 U.S.C. § 1396k, or *Arkansas Dep't of Health and Human Serv's v. Ahlborn*, 126 S. Ct. 1752 (May 1, 2006), prohibit a state Medicaid program from appropriating a survivor's monetary recovery for mental pain and suffering from a wrongful death settlement, beyond the extent of compensation for past medical expenses?

PARTIES TO THE PROCEEDING

The parties to the proceeding are:

Devon Strafford and Michael Luneke, co-personal representatives of the Estate of Lexi Strafford-Luneke, deceased,

And

Agency for Health Care Administration (of the State of Florida).[1]

[1] Florida Medicaid is administered by the Agency for Health Care Administration ("AHCA"), and is referred to here as AHCA or Florida Medicaid.

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CITATIONS OF OPINIONS AND ORDERS ENTERED

The Florida Second District Court of Appeal's opinion is cited at 915 So. 2d 643 (Fla. App. 2d Dist. 2005).[2] App. 1-5.

JURISDICTIONAL STATEMENT

The Probate Court denied the Co-Personal Representatives' Petition for apportionment of the wrongful death settlement on November 3, 2004. App. 8-10. Appeal was taken.

The Second District Court of Appeal's opinion was entered on October 7, 2005. App. 1-5.

A motion for Clarification or Rehearing, App. 21, was filed on October 21, 2005, and denied November 17, 2005. App. 11.

A motion for stay pending United States Supreme Court review of developing caselaw[3] was served November 18, 2005 and denied November 22, 2005. App. 12.

A Notice to Invoke Discretionary Jurisdiction of the Florida Supreme Court was filed December 9, 2005.

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[2] Various orders were entered pursuant to agreements between counsel to extend times for filing briefs, each having requested and given consents.

[3] *Arkansas Dep't of Health and Human Services v. Ahlborn*, 397 F. 3d 620 (8th Cir. 2005), cert. granted, 126 S. Ct. 35 (September 27, 2005), affirmed, 126 S. Ct. 1752 (May 1, 2006).

The Florida Supreme Court declined to exercise its discretionary review jurisdiction by order dated March 27, 2006. App. 13.

STATUTE CONFERRING JURISDICTION ON COURT

The United States Supreme Court has jurisdiction of this case pursuant to 28 U.S.C. § 1257.

STATUTES INVOLVED

42 U.S.C. § 1396p

§ 1396p. Liens, adjustments and recoveries, and transfers of assets

(a) Imposition of lien against property of an individual on account of medical assistance rendered to him under a State plan

(1) No lien may be imposed against the property of any individual prior to his death on account of medical assistance paid or to be paid on his behalf under the State plan, except –

(A) pursuant to the judgment of a court on account of benefits incorrectly paid on behalf of such individual, or

(B) in the case of the real property of an individual –

(i) who is an inpatient in a nursing facility, intermediate care facility for

the mentally retarded, or other medical institution, if such individual is required, as a condition of receiving services in such institution under the State plan, to spend for costs of medical care all but a minimal amount of his income required for personal needs, and

(ii) with respect to whom the State determines, after notice and opportunity for a hearing (in accordance with procedures established by the State), that he cannot reasonably be expected to be discharged from the medical institution and to return home,

except as provided in paragraph (2).

(2) No lien may be imposed under paragraph (1)(B) on such individual's home if –

(A) the spouse of such individual,

(B) such individual's child who is under age 21, or (with respect to States eligible to participate in the State program established under subchapter XVI of this chapter) is blind or permanently and totally disabled, or (with respect to States which are not eligible to participate in such program) is blind or disabled as defined in *section 1382c* of this title, or

(C) a sibling of such individual (who has an equity interest in such home and who was residing in such individual's home for a period of at least one year immediately before

the date of the individual's admission to the medical institution),

is lawfully residing in such home.

(3) Any lien imposed with respect to an individual pursuant to paragraph (1)(B) shall dissolve upon that individual's discharge from the medical institution and return home.

* * *

The following are set forth in the Appendix:

Florida Statutes

Medicaid Third Party Liability Act,
§ 409.910(11)(f)
Wrongful death § 768.21
Verdict Form § 768.22

Federal Statutes

42 U.S.C. § 1396k

CONCISE STATEMENT OF FACTS

The underlying action was a wrongful death suit seeking recovery for birth injuries suffered by the infant child of the co-personal representatives, Devon Strafford and Michael Luneke. Florida Medicaid paid $74,903.41 for medical care and services, and asserted a lien. The lawsuit settled for $485,000.00. However, the amount was a lump sum and there were no allocations between the various claims. App. 2.

A Petition was filed in the Probate Court requesting that the Probate Judge make the required allocation. The

Probate Judge held that the Medicaid lien was not reduced by application of § 409.910(11)(f), FLA. STAT., and denied the Petition. App. 8-9. Accordingly, Medicaid's lien was applied to the entire recovery, rather than the amount of medical care and services Medicaid provided.

The co-personal representatives appealed. The brief on the merits was served February 10, 2005. The case was argued August 16, 2005.

The federal question was raised first by implication, and then, expressly. The federal question was raised by implication by filing a Notice of Supplemental Authority on September 22, 2005. App. 25-26. The case cited was *Arkansas Dep't of Health and Human Serv's v. Ahlborn*, 397 F. 3d 620 (8th Cir. 2005). Court rules prohibited argument with the filing. Rule 9.225, Fla. R. App. P. App. 20. Although *Ahlborn* was not then binding precedent, the United States Supreme Court granted certiorari in *Ahlborn*, 126 S. Ct. 35 (September 27, 2005), and later affirmed, 126 S. Ct. 1752 (May 1, 2006).

A motion for Clarification or Rehearing was filed on October 21, 2005, and denied November 17, 2005, which expressly raised the federal question. App. 21-24.

A motion for stay pending United States Supreme Court review of *Arkansas Dep't of Health and Human Serv's v. Ahlborn*, 397 F. 3d 620 (8th Cir. 2005) was served November 18, 2005, and denied November 22, 2005. App. 12.

Florida's Supreme Court declined jurisdiction March 27, 2006. App.13. This Petition followed.

I. SUBSTANTIVE ARGUMENT

This case involves the collision of federal Medicaid law, Florida's Medicaid Third Party Liability Act, and Florida's wrongful death statutes. This Honorable Court should grant certiorari because Florida's decision directly conflicts with *Arkansas Dep't of Health and Human Serv's v. Ahlborn*, 126 S. Ct. 1752 (May 1, 2006).

Lexi Strafford Luneke suffered severe injuries during her birth, from which she ultimately died. Florida Agency for Health Care Administration ("AHCA") paid $74,903.41 for her medical care during her short life. App. 2. Florida Medicaid violated the *Ahlborn* rule by asserting a lien against the gross settlement proceeds without apportionment. App. 5.

A. One Lawsuit, Multiple Claimants

Devon Strafford and Michael Luneke, her parents, petitioned the probate court and were appointed co-personal representatives of the estate. A lawsuit was filed to recover for Lexi's injuries. Section 768.20, FLA. STAT., requires that a single action be brought to recover for the benefit of the estate and the survivors. *Wiggins v. Estate of Wright*, 850 So. 2d 444, 446 (Fla. App. 2003).

The estate's damages for a minor child decedent are medical expenses and funeral expenses. Section 768.21(6)(a), FLA. STAT. App. 18. "Each parent of a deceased minor child may also recover for mental pain and suffering from the date of injury." Section 768.21(4), FLA. STAT. App. 18. The lawsuit was settled for a lump-sum of $485,000.00.

B. Apportionment Between Survivors And The Estate

Where there is a "non-specific settlement offer from a defendant, a personal representative is bound to proportion proceeds for the survivors and the estate in a reasonable and equitable manner." *University Med. Ctr. v. Zeiler*, 625 So. 2d 120, 122 (Fla. App. 1993), *see*, *Continental Nat'l Bank v. Brill*, 638 So. 2d 1056, 1057 (Fla. App. 1994) (allowing creditor to participate in apportionment). If a case is tried to a jury, "[t]he amounts awarded to each survivor and to the estate shall be stated separately in the verdict." Section 768.22, FLA. STAT.; *see*, *Wiggins*, 850 So. 2d at 446.

The co-personal representatives petitioned the probate court to apportion the sum between the survivors and the estate, and apply § 409.910(11)(f), FLA. STAT., App. 19, which reduces AHCA's recovery by 25% for attorney fees, plus taxable costs, and then divides the result, half of which goes to Medicaid, up to the amount of assistance it provided and the balance to the recipient. The co-personal representatives agreed with the $74,903.41 claimed by AHCA and suggested that amount be used as the basis. Indeed, there could have been no greater amount, because the only other element of damages, funeral expenses, would have been recoverable for the benefit of the survivor that paid them. Section 768.21(5), FLA. STAT. App. 18.

Notwithstanding the clear requirement for an apportionment, *Zeiler*, *Brill*, the probate court simply denied the request. While it may have been foreseeable in a contested case that certain elements of medical expenses were or were not incurred, it was simply inconceivable that the petition would be denied.

C. The *Ahlborn* Rule

The ultimate issue is whether the formula found in § 409.910(11)(f), FLA. STAT., App. 19-20, is applied only to the amount of the $74,903.41 lien for medicals, as the co-personal representatives assert, or to the gross settlement of $485,000.00, as AHCA asserts. In other words, does application of the lien to the entire recovery violate the *Ahlborn* rule?

The United States Supreme Court recently decided *Arkansas Dep't of Health and Human Serv's v. Ahlborn*, 126 S. Ct. 1752 (May 1, 2006). There, the plaintiff received Medicaid assistance of $215,645.30, of which $35,581.47 was for medical payments. The Medicaid lien claimed was for the higher amount. The United States Supreme Court unanimously affirmed the 8th Circuit, and held that Medicaid's lien is limited to the amount of medicals. *Id.* at 1767.

That case clarified the anti-lien provision of federal Medicaid law, 42 U.S.C. § 1396p(a)(1), limiting enforcement of liens to the amount of medical care and services provided. Although *Ahlborn* involved a living plaintiff, and this is a death case, it is a distinction without a difference, because the deceased infant had no property rights beyond the right to recover for medical expenses under § 768.21, FLA. STAT.

Here, the amount of the medicals is $74,903.41. AHCA asserted its lien against the entire $485,000.00 settlement, and before apportionment between the estate and survivors, App. 5, without a determination whether *any* of that amount was for medicals. While AHCA admitted that the reduction formula of § 409.910(11)(f), FLA. STAT., applies, AHCA asserted that the formula does not reduce the lien

recovery. (Record at 82). This is only true if an amount in excess of the medical payments is used as the basis.

This is what *Ahlborn* prohibits.

AHCA can only recover on its lien pursuant to the anti-lien statute, 42 U.S.C. § 1396p. Recovery of medical expenses is only addressed in 42 U.S.C. § 1396p(a)(1). The balance of the statute does not apply.

This case involves a lien being enforced post-death. Therefore, from the tort settlement, there are two segments of the recovery that AHCA can attack: (1) the survivors' shares or (2) the estate, because of the single action rule. *Wiggins*, 850 So. 2d at 446. Section 768.21, FLA. STAT., App. 17-19, specifies the recoverable damages for each real party in interest. Here, the estate recovers medicals, and the survivors recover for their mental pain and suffering.

Both sides admit the amount of medical expenses and the lien amount. The question is a pure question of law. May AHCA assert its lien on the entire lawsuit settlement proceeds or does *Ahlborn* apply, thereby limiting AHCA to the amount of medical care and services?

If the Medicaid lien attaches to the entire lawsuit proceeds, which is contrary to *Ahlborn*, then Medicaid's recovery will not be reduced by application of the formula in § 409.910(11)(f), FLA. STAT. Then the survivors shoulder the entire burden of the legal fees and costs. However, if AHCA may only lien the medical component, then Medicaid's recovery is reduced by the formula in § 409.910(11)(f), FLA. STAT., so that AHCA shares in the litigation fees and costs.

Florida is doing the wrong thing by asserting its liens against gross recoveries, before apportionment in wrongful death cases, and turning a blind eye to *Ahlborn*. This Honorable Court should accept jurisdiction of this case, summarily vacate the opinion of the Second District Court of Appeal, and remand the case for reconsideration in light of *Arkansas Dep't of Health and Human Serv's v. Ahlborn*, 126 S. Ct. 1752 (May 1, 2006).

II. RAISING THE ISSUE

The issue was raised for the first time at the appellate level. This is sufficient in this case because the state court decision "suppl[ies] a new and unexpected basis for a claim by the defeated party of the denial of a federal right." *See, Great Northern Ry. Co. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358, 366-67 (1932) (Cardozo, J.); *Brinkerhoff-Farris Trust & Sav. Co. v. Hill*, 281 U.S. 673 (1930) (Brandeis, J.) (holding petition for rehearing raising federal claim for the first time was raised at the first opportunity, and therefore, timely).

In *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772 (1981), this Court decided the issue of unemployment taxes and exemptions thereto, based upon the construction of the Federal Unemployment Tax Act ("FUTA"), a cooperative federal-state program of benefits to unemployed workers, and the meaning of the word "church."

> The South Dakota Supreme Court's analysis depended entirely on its understanding of the meaning of FUTA and the First Amendment, and did not rest on any independent and adequate state ground. We therefore are at liberty to

> review this judgment, *although literally, it concerns the construction of a state statute.*

Id. at 780 n.9 (emphasis added).

There, the United States Supreme Court relied in part upon the FUTA being a joint state federal program, because it deprived the state from having an independent ground to support its decision.

Here, it is exactly the same: "The [Medicaid] program is a cooperative one; the federal government pays between 50% and 83% of the costs the state incurs for patient care, and, in return, the State pays its portion of the costs and complies with certain statutory requirements. . . ." *Ahlborn*, 126 S. Ct. at 1758.

Taylor v. Illinois, 484 U.S. 400 (1988), also allowed the federal issue to be raised for the first time on appeal. "[B]ut in this case the authority cited by petitioner and the manner in which the fundamental right at issue has been described and understood by the Illinois courts make it appropriate to conclude that the constitutional question was sufficiently well presented to the state courts to support our jurisdiction." *Id.* at 406 n.9. There, the claim was raised in a petition for rehearing in the state appellate court. However, the motion for rehearing contained specific citations to authority.

Here, the issue is identical. The issue was raised in a motion for rehearing that contained specific citations to *Ahlborn* showing violation of federal Medicaid law. App. 21-24.

III. CONCLUSION

This Honorable Court should accept jurisdiction of this case, and summarily reverse and remand for reconsideration in light of *Arkansas Dep't of Health and Human Serv's v. Ahlborn*, 126 S. Ct. 1752 (May 1, 2006).

Respectfully submitted,

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915 So.2d 643

District Court of Appeal of Florida,
Second District.

Devon E. STRAFFORD and Michael C. **Luneke**,
Individually, and as Co-Personal Representatives
of the Estate of Lexi E. Strafford-**Luneke**, deceased,
Appellants,
v.
AGENCY FOR HEALTH CARE ADMINISTRATION,
Appellee.
No. 2D04-5502.
Oct. 7, 2005.

Steven K. Schwartz of Steven K. Schwartz, P.A., Aventura, for Appellants.

D. Finn Pressly and Hala A. Sandridge of Fowler White Boggs Banker, P.A., Tampa, and Floyd B. Faglie of Health Management Systems, Tallahassee, for Appellee.

WALLACE, Judge.

Devon E. Strafford and Michael C. Luneke, individually and as co-personal representatives of the Estate of Lexi E. Strafford-Luneke, deceased (the Co-Personal Representatives), challenge the probate court's order denying their petition for the apportionment of monies received as a result of the settlement of an action for the wrongful death of Lexi E. Strafford-Luneke (the Decedent). The Agency for Health Care Administration (the Agency) objected to the proposed apportionment because it did not provide for the full payment of the Medicaid lien due the State under the Medicaid Third-Party Liability Act, section 409.910, Florida Statutes (2001) (the Act). We affirm because the unambiguous language of the Act

requires that the lien be paid in full from the settlement proceeds.

In July 2001, the Decedent was born at a birthing clinic in Collier County. During her birth, the Decedent suffered a lack of oxygen to her brain and remained in a vegetative state until her death on August 3, 2003. She accumulated $74,903.41 in medical bills. The Agency paid these medical expenses through Florida's Medicaid program. § 409.902.

The Co-Personal Representatives-the Decedent's unmarried parents-filed a wrongful death action against the birthing clinic and some of its employees. In the wrongful death action, the Co-Personal Representatives sought, among other things, recovery for the medical expenses paid by Medicaid. Before the Co-Personal Representatives filed the wrongful death action, the Agency notified them several times that it held an outstanding lien on any third-party recovery in the amount of $74,903.41. The Co-Personal Representatives eventually settled the wrongful death action for a single, undivided sum of $485,000.

The Co-Personal Representatives subsequently petitioned the probate court to apportion the settlement amount between the Decedent's estate and the Co-Personal Representatives in their individual capacities. The Co-Personal Representatives calculated that the Decedent's estate should only receive an amount equal to the Decedent's medical expenses-$74,903.41. They contended that their apportionment scheme would trigger the statutory formula reduction contained in section 409.910(11)(f),

thereby reducing the Agency's actual recovery from $74,903.41 to $4986.49.[1]

In its objection to the petition, the Agency asserted that its lien attached to the entire settlement, not just the amount allocated to the Decedent's estate. The Agency directed the probate court's attention to multiple provisions of the Act that provide that the lien shall not be reduced, prorated, or applied to only a portion of a settlement. The probate court agreed with the Agency and ruled that the express provisions of section 409.910 prohibited the reduction of the Medicaid lien. In its order denying the petition, the probate court ordered the Co-Personal Representatives to pay the Agency $74,903.41-the full amount of its lien.

The Florida Legislature clearly expressed its intent in enacting the Act in section 409.910(1). Under the statute, Medicaid is to be the "payor of last resort." If benefits of a liable third party become available after Medicaid has provided assistance, Medicaid is to "be repaid in full and prior to any other person, program, or entity." *Id.* Medicaid is to be repaid in full, "regardless of whether a recipient is made whole or others creditors paid." *Id.* As the First

[1] The Co-Personal Representatives arrived at the $4986.49 figure they proposed to pay to the Agency in satisfaction of its lien by first allocating $74,903.41 from the lump sum settlement amount to the Decedent's estate as representing the recovery of medical expenses. Next, the Co-Personal Representatives calculated the total of the applicable attorney's fees at twenty-five percent and all of the costs as $64,930.43. After deducting attorney's fees and costs from the amount allocated to the Decedent's estate, the net amount available to the estate was reduced to $9972.98. From this amount, the Co-Personal Representatives proposed to pay one-half, or $4986.49, to the Agency and the balance to the estate.

District said in *State, Agency for Health Care Administration v. Wilson,* 782 So.2d 977, 979 (Fla. 1st DCA 2001), section 409.910 "goes to great lengths to establish legislative intent to recover 100% of the amount Medicaid has paid where a third-party recovery is available."

Section 409.910(6) provides at least three ways by which the Agency can recover from a third party the expenses it has paid or become liable for under the Medicaid program. First, the Agency is automatically subrogated to any rights that a recipient has to any third-party benefit for the full amount of medical assistance provided by Medicaid. § 409.910(6)(a). Second, the acceptance of Medicaid benefits results in an automatic assignment to the Agency of any right the recipient has to any third-party benefits. § 409.910(6)(b). Third, the Agency is entitled to an automatic lien for the full amount of medical assistance provided. § 409.910(6)(c).

The Act also explicitly addresses the mechanics of the Agency's recovery. Prior to a judgment or settlement, the Agency must be given notice and a reasonable opportunity to file and satisfy its lien. § 409.910(11)(d). Following a settlement, the court is required to segregate an amount sufficient to repay the Agency's expenditures for medical assistance and shall order this amount to be paid directly to the Agency. § 409.910(11)(c). Furthermore, recovery pursuant to the Agency's subrogation rights "shall not be reduced, prorated, or applied to only a portion of a judgment, award, or settlement, but is to provide full recovery by the agency from any and all third-party benefits." § 409.910(6)(a). In fact, a mandatory distribution scheme is contained in section 409.910(11)(f), which provides that after attorney's fees-calculated at twenty-five percent of the judgment or settlement-and costs are deducted, one-half of

the remaining recovery shall be paid to the Agency up to the total amount of medical assistance provided.

Under these provisions, the Agency is entitled to recover the full amount of the Medicaid lien from the entire settlement amount subject to the limiting formula in section 409.910(11)(f). Admittedly, the settlement in this case occurred in the context of a wrongful death action in which the recoverable damages for the survivors and the decedent's estate are distinct and limited by section 768.21, Florida Statutes (2003). Even so, the Act's provisions require that the Agency be paid prior to any apportionment between the estate and the survivors. Based on the amount of the settlement, the lien, and the attorney's fees and costs in this case, the distribution scheme in section 409.910(11)(f) entitles the Agency to the full recovery of its Medicaid lien. Because the probate court correctly construed the Act and ordered the Co-Personal Representatives to pay the lien in its entirety, we affirm the order denying the Co-Personal Representatives' petition for apportionment.

Affirmed.

KELLY and VILLANTI, JJ., Concur.

IN THE CIRCUIT COURT IN AND FOR COLLIER COUNTY, FLORIDA

IN RE: THE ESTATE OF LEXI E. STAFFORD-LUNEKE
Deceased. /

File No.: 03-1184-CP (02-HDH)
Division Probate

ORDER COMPELLING THE CO-PERSONAL REPRESENTATIVES TO PAY THE AGENCY'S $74,903.41 MEDICAID CASUALTY LIEN PURSUANT TO THIS COURT'S ORDER OF NOVEMBER 3, 2004

(Filed Apr. 6, 2006)

THIS CAUSE came before the Court for hearing on March 28, 2006 on the CO-PERSONAL REPRESENTATIVE'S MOTION FOR STAY, THE AGENCY FOR HEALTH CARE ADMINISTRATION'S (Agency") OBJECTION TO MOTION FOR STAY, and THE AGENCY'S MOTION TO COMPEL CO-PERSONAL REPRESENTATIVES TO PAY THE AGENCY'S $74,903.41 MEDICAID CASUALTY LIEN PURSUANT TO THIS COURT'S ORDER OF NOVEMBER 3, 2004, and the Court hearing argument of Steven K. Schwartz, counsel for the Co-Personal Representatives, and Floyd Faglie, counsel for the Agency, and being otherwise fully informed in the premises, it is;

ORDERED and ADJUDGED that:

1. The Co-Personal Representative's Motion For Stay is **DENIED**;
2. The Agency's Motion To Compel is **GRANTED**;
3. The Co-Personal Representatives are directed to make payment to the Agency within five (5) days

of this Order of $74,903.41 in accordance with this Court's Order of November 3, 2004.

DONE AND ORDERED in Chambers at Naples, Collier County Florida this ___ day of ___ 2006.

/s/ Hugh D. Hayes
JUDGE HUGH D. HAYES

Copies furnished to:
Floyd Faglie, Esq.
Steven Schwartz, Esq.
TPL: 55425

IN THE CIRCUIT COURT IN AND FOR COLLIER COUNTY, FLORIDA

IN RE: THE ESTATE OF
LEXI E. STAFFORD-LUNEKE
Deceased. /

File No.: 03-1184-CP (02-HDH)
Division Probate

ORDER Denying PETITION FOR APPORTIONMENT

THIS CAUSE came before the Court for hearing on September 15, 2004, on the Co-personal Representatives' Petition for Apportionment and the Agency for Health Care Administration's ("Agency") Objection to Petition for Apportionment, and the Court hearing argument of, Steven Schwartz, counsel for the Co-personal Representatives, and Floyd Faglie, counsel for the Agency, and the Court being fully advised in the premises, the Court finds as follows:

1. The Co-personal Representatives of the above captioned estate brought an action for medical malpractice/wrongful death based on injuries the above named decedent suffered as a result of an incident of July 5, 2001.

2. This action has settled for $485,000.00.

3. The Agency has asserted a $74,903.41 Section 409.910, Florida Statutes, Medicaid Casualty Lien, related to medical goods and services provided to the decedent by Medicaid associated with the incident of July 5, 2001.

4. The Co-personal Representatives of the estate have petitioned the Court to apportion the settlement proceeds pursuant to Section 768.21, Florida Statutes, so that the Agency receives

$4,986.49 in satisfaction of the Agency's $74,903.41 Medicaid Casualty Lien.

5. The Agency has filed an Objection to the Petition for Apportionment arguing that:

   a. Pursuant to Section 409.910, Florida Statutes, the Medicaid Casualty Lien is a lien against third-party proceeds from a judgment, award or settlement;

   b. Pursuant to Section 409.910(6), Florida Statutes, a Medicaid Casualty Lien shall not be reduced, prorated, or applied to only a portion of a judgment, award, or settlement, but is to provide full recovery by the Agency from any and all third-party benefits;

   c. Pursuant to Section 409.910(11)(c), Florida Statutes, in the event of judgment, award, or settlement in a claim or action against a third-party, the court shall order the segregation of an amount sufficient to repay the Agency's expenditures for medical assistance, and shall order such amounts paid directly to the Agency;

   d. And as explained in *State, Agency for Health Care Admin. v. Wilson*, 782 So. 2d 977 (1st DCA 2001), the formula reduction provided in Section 409.910(11)(f), Florida Statutes, is the only statutorily allowed reduction in the Agency's Medicaid Casualty Lien, and in the instant case this formula reduction does not reduce the Agency's recovery,

ORDERED AND ADJUDGED as follows:

1. The Co-personal Representatives' Petition for Apportionment is DENIED;

2. Within thirty (30) days of the entry of this Order, the Co-personal Representatives shall make payment of the Agency's $74,903.41 Medicaid Casualty Lien;

3. Upon the Agency's receipt of the $74,903.41, the Agency shall execute and provide to counsel for the Co-personal Representatives a Release of Lien.

DONE AND ORDERED in Chambers, Collier County, Florida, this ___ day of ___ 2004.

/s/ Hugh D. Hayes
CIRCUIT JUDGE
HUGH D. HAYES

Copies furnished to:
Steven Schwartz, Esq.
Floyd Faglie, Esq.
TPL: 55425

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
SECOND DISTRICT, POST OFFICE BOX 327,
LAKELAND, FL 33802-0327

November 17, 2005

CASE NO.: 2D04-5502
L.T. No.: 03-1184

Devon Stafford, Et Al	v.	Agency For Health Care Administration
Appellant/Petitioner(s),		Appellee/Respondent(s).

BY ORDER OF THE COURT:

Appellants' motion for clarification or rehearing is denied.

I HEREBY CERTIFY that the foregoing is a true copy of the original court order.

Served:

Steven K. Schwartz, Esq. D. Finn Pressly, Esq. Floyd Faglie Dwight E. Brock, Clerk

bl

/s/ James Birkhold
James Birkhold
Clerk

[LOGO]

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
SECOND DISTRICT, POST OFFICE BOX 327,
LAKELAND, FL 33802-0327

November 22, 2005

CASE NO.: 2D04-5502
L.T. No.: 03-1184

Devon Stafford, Et Al v. Agency For Health Care Administration

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Appellant/Petitioner(s), Appellee/Respondent(s).

BY ORDER OF THE COURT:

Appellants' motion for stay is denied.

I HEREBY CERTIFY that the foregoing is a true copy of the original court order.

Served:

Steven K. Schwartz, Esq. D. Finn Pressly, Esq. Floyd Faglie
Dwight E. Brock, Clerk

pm

/s/ James Birkhold
James Birkhold
Clerk

[LOGO]

SUPREME COURT OF FLORIDA

MONDAY, MARCH 27, 2006

CASE NO.: SC05-2304
Lower Tribunal No.:
2D04-5502

DEVON E. STAFFORD v. FLORIDA AGENCY FOR HEALTH CARE ADMINISTRATION

Petitioner(s) Respondent(s)

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V., Section 3(b), Florida Constitution, and the Court having determined that it should decline to accept jurisdiction, it is ordered that the petition for review is denied.

No motion for rehearing will be entertained by the Court. *See* Fla. R. App. P. 9.330(d).

PARIENTE, C.J., and WELLS, ANSTEAD, LEWIS and QUINCE, JJ., concur.

A True Copy
Test:

/s/ Thomas D. Hall [LOGO]
Thomas D. Hall
Clerk, Supreme Court

MC
Served:

HON. HUGH D. HAYES, CHIEF JUDGE
STEVEN K. SCHWARTZ
FLOYD BENJAMIN FAGLIE
HALA A. SANDRIDGE
DAVID FINN PRESSLY
HON. JAMES BIRKHOLD, CLERK
HON. DWIGHT E. BROCK, CLERK

42 U.S.C.A. § 1396k. Assignment, enforcement, and collection of rights of payments for medical care; establishment of procedures pursuant to State plan; amounts retained by State

(a) For the purpose of assisting in the collection of medical support payments and other payments for medical care owed to recipients of medical assistance under the State plan approved under this subchapter, a State plan for medical assistance shall –

> **(1)** provide that, as a condition of eligibility for medical assistance under the State plan to an individual who has the legal capacity to execute an assignment for himself, the individual is required –
>
> > **(A)** to assign the State any rights, of the individual or of any other person who is eligible for medical assistance under this subchapter and on whose behalf the individual has the legal authority to execute an assignment of such rights, to support (specified as support for the purpose of medical care by a court or administrative order) and to payment for medical care from any third party;
> >
> > **(B)** to cooperate with the State (i) in establishing the paternity of such person (referred to in subpa agraph (A)) if the person is a child born out of wedlock, and (ii) in obtaining support and payments (described in subparagraph (A)) for himself and for such person, unless (in either case) the individual is described in section 1396a(l)(1)(A) of this title or the individual is found to have good cause for refusing to cooperate as determined by the State agency in accordance with standards prescribed by the Secretary, which standards shall take into consideration the best interests of the individuals involved; and

(C) to cooperate with the State in identifying, and providing information to assist the State in pursuing, any third party who may be liable to pay for care and services available under the plan, unless such individual has good cause for refusing to cooperate as determined by the State agency in accordance with standards prescribed by the Secretary, which standards shall take into consideration the best interests of the individuals involved; and

(2) provide for entering into cooperative arrangements (including financial arrangements), with any appropriate agency of any State (including, with respect to the enforcement and collection of rights of payment for medical care by or through a parent, with a State's agency established or designated under section 654(3) of this title) and with appropriate courts and law enforcement officials, to assist the agency or agencies administering the State plan with respect to (A) the enforcement and collection of rights to support or payment assigned under this section and (B) any other matters of common concern.

(b) Such part of any amount collected by the State under an assignment made under the provisions of this section shall be retained by the State as is necessary to reimburse it for medical assistance payments made on behalf of an individual with respect to whom such assignment was executed (with appropriate reimbursement of the Federal Government to the extent of its participation in the financing of such medical assistance), and the remainder of such amount collected shall be paid to such individual.

F.S.A. § 768.21. Damages

All potential beneficiaries of a recovery for wrongful death, including the decedent's estate, shall be identified in the complaint, and their relationships to the decedent shall be alleged. Damages may be awarded as follows:

(1) Each survivor may recover the value of lost support and services from the date of the decedent's injury to her or his death, with interest, and future loss of support and services from the date of death and reduced to present value. In evaluating loss of support and services, the survivor's relationship to the decedent, the amount of the decedent's probable net income available for distribution to the particular survivor, and the replacement value of the decedent's services to the survivor may be considered. In computing the duration of future losses, the joint life expectancies of the survivor and the decedent and the period of minority, in the case of healthy minor children, may be considered.

(2) The surviving spouse may also recover for loss of the decedent's companionship and protection and for mental pain and suffering from the date of injury.

(3) Minor children of the decedent, and all children of the decedent if there is no surviving spouse, may also recover for lost parental companionship, instruction, and guidance and for mental pain and suffering from the date of injury. For the purposes of this subsection, if both spouses die within 30 days of one another as a result of the same wrongful act or series of acts arising out of the same incident, each spouse is considered to have been predeceased by the other.

(4) Each parent of a deceased minor child may also recover for mental pain and suffering from the date of injury. Each parent of an adult child may also recover for mental pain and suffering if there are no other survivors.

(5) Medical or funeral expenses due to the decedent's injury or death may be recovered by a survivor who has paid them.

(6) The decedent's personal representative may recover for the decedent's estate the following:

(a) Loss of earnings of the deceased from the date of injury to the date of death, less lost support of survivors excluding contributions in kind, with interest. Loss of the prospective net accumulations of an estate, which might reasonably have been expected but for the wrongful death, reduced to present money value, may also be recovered:

1. If the decedent's survivors include a surviving spouse or lineal descendants; or

2. If the decedent is not a minor child as defined in s. 768.18(2), there are no lost support and services recoverable under subsection (1), and there is a surviving parent.

(b) Medical or funeral expenses due to the decedent's injury or death that have become a charge against her or his estate or that were paid by or on behalf of decedent, excluding amounts recoverable under subsection (5).

(c) Evidence of remarriage of the decedent's spouse is admissible.

(7) All awards for the decedent's estate are subject to the claims of creditors who have complied with the requirements of probate law concerning claims.

(8) The damages specified in subsection (3) shall not be recoverable by adult children and the damages specified in subsection (4) shall not be recoverable by parents of an adult child with respect to claims for medical negligence as defined by s. 766.106(1).

F.S.A. § 768.22. Form of verdict

The amounts awarded to each survivor and to the estate shall be stated separately in the verdict.

F.S.A. § 409.910

Responsibility for payments on behalf of . . .

* * *

(11)

(f) Notwithstanding any provision in this section to the contrary, in the event of an action in tort against a third party in which the recipient or his or her legal representative is a party which results in a judgment, award, or settlement from a third party, the amount recovered shall be distributed as follows:

1. After attorney's fees and taxable costs as defined by the Florida Rules of Civil Procedure, one-half of the remaining recovery shall be paid to the agency up to the total amount of medical assistance provided by Medicaid.

2. The remaining amount of the recovery shall be paid to the recipient.

3. For purposes of calculating the agency's recovery of medical assistance benefits paid, the fee for services of an attorney retained by the recipient or his or her legal representative shall be calculated at 25 percent of the judgment, award, or settlement.

* * *

Fla.R.App.P. Rule 9.225

Notices of supplemental authority may be filed with the court before a decision has been rendered to call attention to decisions, rules, statutes, or other authorities that are significant to the issues raised and that have been discovered after the last brief served in the cause. The notice may identify briefly the points argued on appeal to which the supplemental authorities are pertinent, but shall not contain argument. Copies of the supplemental authorities shall be attached to the notice.

DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

DEVON E. STRAFFORD and MICHAEL C. LUNEKE, individually and as co-personal representatives of the Estate of Lexi E. Strafford Luneke, Deceased, Petitioners/Appellants, v. Agency for Health Care Administration, Respondent/Appellee.	Appeal No. 2D04-5502 Lower Case No. 03-1184-CP

MOTION FOR CLARIFICATION OR REHEARING

Appellants, DEVON E. STRAFFORD and MICHAEL C. LUNEKE, by and through undersigned counsel, hereby respectfully request that this Honorable Court clarify its Opinion, filed October 7, 2005, or grant rehearing, and as grounds therefore state:

1. After the oral argument of this case a Notice of Supplemental Authority was filed together with a copy of the authority, *Ahlborn v. Arkansas Dep't of Human Svcs.*, 397 F.3d 620 (8th Cir. 2005).

2. As stated in the notice, that case stands for the proposition that Medicaid may only claim reimbursement from that part of a third party recovery which is for medical care or services because any broader application would result in an invalid conflict with Federal Medicaid Law, specifically,

42 U.S.C. §§ 1396a(a)(25)(H), 1396k(a)(1)(A) (the anti-lien law).

3. "Medicaid is a cooperative federal-state program through which the federal government provides financial aid to states that furnish medical assistance to eligible low-income individuals." *Comacho v. Texas Workforce Comm'n*, 408 F.3d 229, 232 (5th Cir. 2005), *accord, Spectrum Health Cont'ng Care Group v. Anna Marie Bowling Irrevocable Trust*, 410 F.3d 304, 313 (6th Cir. 2005), *Ahlborn v. Arkansas Dep't of Human Svcs.*, 397 F.3d 620, 623 (8th Cir. 2005), *Public Health Trust of Dade County, Florida v. Dade County Sch. Bd.*, 693 So. 2d 562, 564 (3d DCA 1996).

4. "Once a state chooses to participate in a federally funded program, it must comply with federal standards." *Florida v. Matthews*, 526 F.2d 319, 326 (5th Cir. 1976), *accord, Public Health Trust of Dade County*, 693 So. 2d at 564.

5. Florida has elected to participate in the Medicaid program. *Public Health Trust of Dade County*, 693 So. 2d at 564.

6. "Recipients are not required under federal law to reimburse Medicaid "to the extent of the third party's liability." [] Rather, recipients are only required to assign their rights to third-party payments for medical care. 42 U.S.C. §§ 1396a(a)(25)(H), 1396k(a)(1)(A). We therefore reject [Medicaid's] second reason for requiring States to recover from third-party payment portions not designated for medical care." *Ahlborn*, 397 F.3d at 627.

7. That court also concluded that "state statutes are pre-empted to the extent that they require [a recipient] to assign rights to recover third-party liability payments for matters other than the cost of [the recipient's] medical care and services." *Id.* at 628.

8. "[U]nder the Supremacy Clause, if a state law actually conflicts with a federal statute or regulation, the state law is invalid. See, U.S. Const. art. VI, cl. 2." *Public Health Trust of Dade County,* 693 So. 2d at 564, *accord, Spectrum Health Cont'ng Care Group,* 410 F.3d at 315.

9. Accordingly, clarification (or rehearing) is requested on the issue of whether, in light of federal law as cited herein, Florida's Medicaid lien law, § 409.910, to the extent that it allows for recovery beyond those amounts allocated for medical care and services, is valid.

Respectfully submitted,

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By: _____
Steven K. Schwartz, Esq.
Florida Bar No. 187976

Certificate of Service

I hereby certify that a true copy hereof was served by fax or regular mail on October 20, 2005, to:

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DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

DEVON E. STRAFFORD and MICHAEL C. LUNEKE, individually and as co-personal representatives of the Estate of Lexi E. Strafford Luneke, Deceased, Petitioners/Appellants, v. Agency for Health Care Administration, Respondent/Appellee.	Appeal No. 2D04-5502 Lower Case No. 03-1184-CP

NOTICE OF SUPPLEMENTAL AUTHORITY

Appellants, DEVON E. STRAFFORD and MICHAEL C. LUNEKE, by and through undersigned counsel, hereby file a copy of the following supplemental authority:

Ahlborn v. Arkansas Dep't of Human Svcs., 397 F.3d 620 (8th Cir. 2005).

The case stands for the proposition that Medicaid may only claim reimbursement from that part of a third party recovery which is for medical care or services because any broader application would result in an invalid conflict with Federal Medicaid Law, specifically, 42 U.S.C. §§ 1396a(a)(25)(H), 1396k(a)(1)(A) (the anti-lien law).

Certificate of Service

I hereby certify that a true copy hereof was served by fax or regular mail on September 21, 2005, to:

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